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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re JACOB H., a Person Coming
Under the Juvenile Court Law.

B270555
(Los Angeles County
Super. Ct. No. TJ21169)

THE PEOPLE,

Plaintiff and Respondent,

v.

JACOB H.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Donna Quigley Groman, Judge. Reversed in part, and remanded with directions.

Mary Bernstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Noah P. Hill and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

The juvenile court sustained a petition under Welfare and Institutions Code section 602, finding that Jacob H., a minor, committed two counts of second degree robbery and one count of attempted second degree robbery. The court declared Jacob H. a ward of the court and ordered him confined for a maximum of 17 years. On appeal, Jacob H. contends there was insufficient evidence that he committed the attempted second degree robbery. We agree. We will reverse the juvenile court's finding on that count and remand with directions.

BACKGROUND

On the night of January 15, 2015, Baltazar Alvarez was at a bus stop about one-half block from the Golden Bird Chicken Restaurant, where he worked. A person approached and told him, "Friend, give me the money." When Alvarez said he did not have any money, the person said he would shoot Alvarez, and reached his hand into his waistband area. Alvarez ran, and the person did not follow him.

The following night, Alvarez was working in the kitchen at the Golden Bird. Cashier Christian Nesbit was also there.¹ Two people wearing hooded sweatshirts approached the drive-through

¹ Nesbit testified he did not recall the events of the two robberies, although he did recall having been robbed twice at the restaurant. However, he provided a statement about the robberies to the investigating detective, which the juvenile court admitted.

window on foot. One of them threatened Nesbit with a gun and demanded money. After Nesbit gave them money, they left.

On the night of January 28, 2015, while Alvarado and Nesbit were working, a person wearing a beanie-type hat entered the restaurant and approached Nesbit at the counter. The person showed a small handgun and demanded money. He fled after Nesbit gave him money.

When police investigated the first robbery at the Golden Bird, Alvarez told them about the incident at the bus stop, which became part of the investigation. In early February 2015, police showed him a flip book containing six photographs, including a photograph of Jacob H. as photo number 3. Alvarez initialed and circled that photograph and wrote a statement in Spanish, stating, "This looks like the one that came to the bus stop, and he looks like the one on the second and third case," referring to the two robberies at the restaurant. He also wrote, "He threatened that he was going to shoot me, and I ran," and "He was behind the person that had the weapon," referring to the two people at the drive-through.

In court, the prosecutor asked if Alvarez had circled photo number 3 "because that person looked like the person that was at Golden Chicken." Alvarez answered affirmatively. The prosecutor asked, "And do you see that person in court today?" Alvarez identified Jacob H. Alvarez testified that his memory was better when he reviewed the photo flip book than at trial.

On cross-examination, Alvarez testified that it was dark at the bus stop, and when asked if he could see the face of the assailant, he said, "Not clearly." He also testified that he could not clearly see the face of the second person at the drive-through because that person was not standing directly in front of the

window, and he could not see the entire face of the person who robbed the cashier at the counter because the beanie covered part of his face to below his lower eyelid.

Minor's counsel asked how positive Alvarez had been about his identification for the bus stop robbery, to which Alvarez said 70 percent.

He further testified that minor's counsel interviewed him in September 2015, at which time he said he was only 30 percent confident of the identification he made when he circled the photograph.

Minor's counsel introduced a written statement Alvarez provided at the interview in September 2015, the translation of which reads in part, "On January 15, 2015, I was robbed at the bus-stop at around 11 p.m. It was too dark for me to be able to see the face of the person who robbed me. [¶] . . . [¶] On February 3, 2015 the police showed me pictures of people who were suspects. I circled the photo of the person that I thought resembled the person that was involved in the three robberies but I was not sure that the person was the correct one. I am 30% sure that the person I circled was the same person that robbed me at the bus-stop"

Minor's counsel referred to Alvarez's earlier testimony that his memory was better when the robberies had just happened than today, and Alvarez responded, "Yes. But right now upon seeing the person, I remember everything."

On redirect examination, the prosecutor pointed out Jacob H. in court and asked, "And based on your memory of the events that occurred, is this the man that tried to rob you at the bus stop?" Alvarez responded, "I'm not quite sure." The prosecutor then asked, "But you're able to look at the photos, and today, as

you just told your attorney, your memory is clear that this is the person?” Alvarez said yes.

The juvenile court adjudicated Jacob H. to have committed all three offenses. Proceeding to disposition, the court committed Jacob H. to the Division of Juvenile Justice for a maximum of 17 years,² calculated as follows: For the robbery inside the Golden Bird on January 28, 2015 (count 2, treated as the principal term), the court imposed five years for second degree robbery (Pen. Code, § 211) and 10 years for personal use of a firearm (Pen. Code, § 12022.53, subd. (b)), for a total of 15 years on that count. For the robbery at the Golden Bird drive-through on January 16, 2015 (count 1), the court consecutively imposed one year (one-third the middle term of three years) for second degree robbery and four months (one-third of one year) for use of a firearm by a principal (Pen. Code, § 12022, subd. (a)(1)). For the attempted robbery at the bus stop on January 15, 2015 (count 3), the court consecutively imposed eight months (one-third the middle term of two years) for attempted second degree robbery.

Jacob H. appealed.

DISCUSSION

Jacob H. contends insufficient evidence supported the juvenile court’s finding that he was the person who attempted to rob Alvarez at the bus stop on January 15, 2015. We agree.

² The juvenile court stated at the hearing that the maximum period of confinement was 17 years 4 months, but that is inconsistent with both the disposition minute order and the correct calculation of the period of confinement. Thus, we resolve the inconsistency in favor of the disposition minute order. (See *In re Merrick V.* (2004) 122 Cal.App.4th 235, 249 [conflicts are resolved in favor of reporter’s transcript unless circumstances dictate otherwise].)

In juvenile cases, as in criminal proceedings, “we review the whole record in the light most favorable to the judgment to decide whether substantial evidence supports the conviction, so that a reasonable fact finder could find guilt beyond a reasonable doubt.” (*In re Matthew A.* (2008) 165 Cal.App.4th 537, 540.) Substantial evidence is “evidence which is reasonable, credible, and of solid value.” (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) In determining whether sufficient evidence existed to support the judgment, we do not reweigh the evidence or make determinations of witness credibility. (*People v. Jennings* (2010) 50 Cal.4th 616, 638.) We presume all facts in support of the judgment that could reasonably be deduced from the evidence. (*Id.* at pp. 638-639.) However, “[e]vidence which merely raises a strong suspicion of the defendant’s guilt is not sufficient to support a conviction.” (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Only Alvarez witnessed the attempted robbery at the bus stop. When Alvarez reviewed a photograph of Jacob H.’s face in a flip book, he said it “looks like the one that came to the bus stop.” But he testified that it was dark and he could not clearly see the face of the person who tried to rob him that night. In light of his testimony that he could not clearly see the assailant’s face, the statement written on the photograph appears to mean that he thought the photograph showed someone who looked similar to his assailant, rather than that he was the assailant.

Moreover, Alvarez never offered a certain identification of Jacob H. He testified that at the time he reviewed the photograph of Jacob H., he was 70 percent certain in his identification for the bus stop robbery, and in September 2015, he said he was only 30 percent sure that the person in the

photograph was the correct person. He also testified that on the day of trial, he was “not quite sure” that Jacob H. was his assailant. When the prosecutor followed up by asking, “Okay. But you’re able to look at the photos, and today, as you just told your attorney, your memory is clear that this is the person?” he answered, “Yes.” That testimony is ambiguous: It could mean Alvarez’s memory was clear that Jacob H. was the same person as shown in the photograph—which would say nothing about whether Jacob H. was the bus stop assailant. Similarly, Alvarez’s testimony that “right now upon seeing the person, I remember everything” provides no evidence that Alvarez recognized Jacob H. as the assailant at the bus stop, as opposed to at the restaurant robberies.

In sum, Alvarez testified that he believed the photograph in the flip book looked like his assailant, but that testimony falls short of an identification, and could mean simply that Jacob H. resembled the person from the bus stop. Because Alvarez testified that he could not see the assailant’s face clearly, an inference that the person was in fact Jacob H. amounts to speculation. We thus conclude no reasonable fact finder could have found beyond a reasonable doubt that Jacob H. was the person who attempted to rob Alvarez at the bus stop.

The Attorney General relies on *People v. Mohamed* (2011) 201 Cal.App.4th 515 (*Mohamed*). There, three men wearing masks robbed a group of people outside a café. (*Id.* at pp. 517-518.) Shortly after the robbery, police found the defendant about four blocks from the location, and conducted curbside lineups with witnesses. (*Id.* at pp. 518-519.) The first witness—a robbery victim who saw the suspect’s jawline and facial structure below his mask—said she was 80 percent sure the defendant was

one of the robbers, based on his wearing the same clothing and having the same facial hair, facial features, and build as the robber. (*Ibid.*) She said she was not 100 percent sure because the robber had worn a mask. She later identified the defendant at the preliminary hearing and at trial. (*Id.* at p. 519.) The second witness—who observed the robbers as they ran away from the café—identified the defendant at the curbside lineup, saying he was “completely sure” because the defendant was wearing the same clothes as the robber. (*Id.* at pp. 518-519.) At trial, that witness said he had “a little bit’ of doubt about his identification but remained confident in it.” (*Id.* at p. 519.)

The defendant argued the evidence was insufficient that he was involved in the robbery. (*Mohamed, supra*, 201 Cal.App.4th at p. 521.) The Court of Appeal rejected that argument. The court noted that the defendant was found four blocks from the crime scene, summarized the two witnesses’ testimony, and observed that the defendant had provided the police with a false alibi. (*Id.* at pp. 521-522.) The court held that the first witness’s “inability to be 100 percent certain of her curbside identification” and the second witness’s “expression of ‘a little bit’ of doubt about his curbside identification at trial” did not mean there was insufficient support for the verdict, because it “is not essential that a witness be free from doubt as to one’s identity.” (*Id.* at p. 522 [quoting *People v. Lindsay* (1964) 227 Cal.App.2d 482, 494].) The fact that neither witness saw the robber’s entire face did not preclude there being sufficient support for the verdict, because “the identity of a defendant may be established by proof of any peculiarities of size, appearance, similarity of voice, features or clothing.” (*Mohamed, supra*, 201 Cal.App.4th at p. 522 [quoting *People v. Lindsay, supra*, at p. 494].)

This case is distinguishable. First, in *Mohamed*, there was corroborative evidence of the robber's identity: Two witnesses testified regarding the robber's identity, the defendant was found four blocks from the crime scene, and he provided a false alibi. Here, Alvarez was the only witness to the attempted robbery at the bus stop, and there was no evidence other than his testimony connecting Jacob H. to the incident. Second, in *Mohamed*, because the witnesses observed the robber's clothing and build, they were able to identify him despite being unable to see his entire face. Here, no evidence was presented that Alvarez based his statement that the photograph of Jacob H. looked like his assailant on anything other than his assailant's face, and nor was there evidence that Alvarez provided any physical description of his assailant, such as his build or clothing, that could link Jacob H. to the attempted robbery.

Instead, this case is similar to *People v. Redmond, supra*, 71 Cal.2d 745. In that case, a man entered the living room of an elderly couple with his face entirely covered by a mask, said he knew they had \$600, and demanded the money even after they denied having it. He left after the wife gave him \$10 from her purse and after injuring both the husband and wife. (*Id.* at pp. 748-749.) The wife testified that on the day before the incident, a television salesman came to their residence and talked to her and her husband for about 45 minutes.³ (*Id.* at p. 749.) She described the salesman's build and the coat he had worn. At trial, she said that the defendant "resembled the robber and that the robber was wearing the same coat as the television salesman." (*Ibid.*) She also testified about participating in a lineup, saying that "the

³ The husband did not testify. (*People v. Redmond, supra*, 71 Cal.2d at p. 751.)

expression across [the defendant's] eyes and his voice was identical, but the street clothes made him look larger than the clothes he had on that night.” (*Id.* at p. 750.) She testified that at the lineup, she said she “wasn’t sure” whether the defendant was the television salesman, she “wasn’t quite sure it was him outside the eyes and the voice was the same,” but “there was an expression across the eyes” that “resembled” the defendant’s. (*Ibid.*) She admitted that at the lineup, she told an officer she was unable to identify the defendant. (*Id.* at pp. 750-751.) Further, a police officer present at the lineup testified that neither victim could identify the defendant as the salesman or the assailant. (*Id.* at p. 751.)

On review, the Supreme Court noted that the wife did not identify the defendant as the assailant or the salesman at trial; “she testified only that defendant ‘resembles’ her assailant.” (*People v. Redmond, supra*, 71 Cal.2d at p. 756.) The Court further observed that when asked whether she had identified the defendant at the lineup, she “said she ‘wasn’t sure’ and ‘wasn’t quite sure’ whether the man in the lineup was the television salesman.” (*Ibid.*) Noting that the wife testified she could not identify the defendant at the lineup, the Court stated, “The officer’s testimony agreed, and in the circumstances there is no basis for a conclusion that she identified defendant as her assailant or as the television salesman either at the trial or at the lineup.” (*Ibid.*) The Court held there was no substantial evidence of guilt, and reversed the conviction. (*Id.* at pp. 757, 760.)

Here, when shown a photograph of Jacob H., Alvarez wrote that the person depicted “looks like the one that came to the bus stop,” and when giving another statement about the photograph

in September 2015, he wrote that he circled the photograph of a person he thought “resembled” the person in the robberies. Moreover, when asked in court whether Jacob H. was the man who tried to rob him, he said, “I’m not quite sure.” Alvarez did not identify Jacob H. at trial as the bus stop assailant, nor did his prior statements specifically identify Jacob H. Under these circumstances, “it cannot properly be concluded that ‘the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.’” (*People v. Redmond, supra*, 71 Cal.2d at p. 757.)

Accordingly, we hold there was insufficient evidence to support the juvenile court’s finding that Jacob H. committed attempted second degree robbery at the bus stop on January 15, 2015.

DISPOSITION

The juvenile court’s finding that Jacob H. committed attempted second degree robbery on January 15, 2015, is reversed. On remand, the juvenile court shall recalculate Jacob H.’s maximum period of confinement based on counts 1 and 2 only and shall prepare a corrected commitment order for transmission to the appropriate authorities.

NOT TO BE PUBLISHED.

CHANNEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.